





Construction Policy Bulletin

CPB 06-9 Payment of Construction Disputes with Merit

References: *Standard Specifications*
Construction Manual

Section 9-1.04, "Notice of Potential Claim"
Section 4-1.03, "Changes"
Section 5-4, "Disputes"
Section 5-3, "Contract Change Orders"

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Approved: 
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Background

The Division of Construction promptly accepts contractor protests, notices of potential claim, and claims regarding disputed work; investigates the facts of the dispute; collects evidence; analyzes the dispute within the context of the contract; documents its findings; communicates its conclusions; and resolves construction disputes determined to have entitlement authority under the contract.

Resolution of construction disputes entitled by the provisions of the contract can be executed at anytime during the dispute resolution process including: following the receipt of a protest; following the notice of potential claim process; following the receipt of an adverse dispute resolution board recommendation; following a formal claim evaluation; during mediation; or following a binding arbitration decision.

The Division of Construction promptly pays the contractor for work performed including payment for disputed work that the resident engineer has made a determination of entitlement in accordance with Section 5-4, "Disputes," of the *Construction Manual* and Section 9-1.04, "Notice of Potential Claim," of the *Standard Specifications*.

Existing Procedure

The *Standard Specifications* and the *Construction Manual* establish the process for resolving a construction dispute or claim that has merit. The process involves recognizing the claim; issuing an entitlement determination; executing a contract change order; and authorizing payment. The resident engineer does the following:

- Analyzes the contractor's protest, notice of potential claim, or claim.
- Provides a timely response to the contractor in accordance with the notice of potential claim process.
- Takes appropriate action within the scope of the contract.

- Acts within the authority to resolve disputes, in accordance with the *Construction Manual* Section 5-4, "Disputes."
- Involves construction engineers, construction managers, and the district construction deputy directors when construction disputes exceed the resident engineer's delegated authority.

New Procedure

When the resident engineer determines that the contractor is entitled to payment for disputed work or a portion thereof, the resident engineer should do the following:

- Provide full documentation of correspondence, photos, tests, daily reports, field measurements, field samples, certified payrolls, invoices, and other records related to the disputed work.
- Prepare an entitlement analysis that includes: cost calculations and summation of adjustments or previous payments for the disputed work; statements detailing the reasons why the contractor is entitled to recover some if not all of the disputed cost, contract time extension, delay, and impact damages; and Dispute Review Board recommendations.
- Prepare a contract change order to recognize the portion of the disputed work that has been resolved by the resident engineer; and authorize payment to the contractor, even when only a portion of the dispute can be resolved.
- Execute a contract change order only after it has been determined that adequate funding is available for the undisputed portion of disputed work under the original project allocation.
- When there are insufficient funds to execute the contract change order prepare and process a supplemental funds request, secure adequate funding to compensate the contractor for the undisputed work for which payment is entitled, and then executes a contract change order.

When the contractor refuses to sign the contract change order recognizing the dispute and authorizing payment, the resident engineer executes a unilateral contract change order in accordance with Section 4-1.03, "Changes," of *Standard Specifications* and Section 5-3, "Contract Change Orders," of the *Construction Manual*.

The resident engineer must track and document the progress of the disputed work for utilized labor, equipment, and materials. The resident engineer must maintain a constructive relationship with the contractor and continue negotiations to resolve any remaining disputed work.

Keep the following items in mind when creating the unilaterally approved contract change order:

- The only allowable methods of payment for executing a unilaterally approved contract change order are: increases or decreases in contract items, eliminated contract items, adjustments in compensation due to changes in character of work, or extra work at force account as designated by Section 4-1.03, "Changes," of the *Standard Specifications*.
- Consider previous payments to the contractor for the disputed work and integrate the accumulated payment amount into the contract change order as a credit or a deduction.
- Deduct eliminated contract work items from the final cost of the disputed work, when a force account method of payment covers the entire cost to perform the work originally contemplated by the contract.

Include the following standardized clause in unilaterally issued contract change orders to resolve each dispute:

“This contract change order constitutes full and final compensation for all work regarding notice of potential claim (Claim Number and Title) and involving the dispute set forth by this change. This contract change order fully includes and is not limited to compensation for engineering, labor, materials, equipment, subcontracts, overhead, profit, loss, direct cost, indirect cost, changes in scope, sequencing and or scheduling, additions, deletions, effects on productivity, delays, disruptions, ripple effects, impacts, extra work, quantum merit and equitable adjustments, and for any further claims for compensation, resulting directly or indirectly from the disputed work in this change.”

Also, include the following standardized clause on the issued contract change order, when the contractor agrees to execute the issued contract change order to resolve each dispute.

“All past, present and future claims against Caltrans by the prime contractor, sub-contractors, its suppliers and lower tier sub-contractors that are incidental to or as a consequence of the disputed work in this change are fully satisfied by this adjustment in its entirety.”

Please direct questions or enquiries regarding this bulletin to Ronald Bacani, Office of Contract Administration, Division of Construction, at (916) 654-4452 or e-mail at Ronald_Bacani@dot.ca.gov.